

Frequently Asked Questions About New York City's Employment Protections Based on Criminal History

1. What were the major changes to the NYC Human Rights Law's employment protections for people with criminal records in 2019 and 2021?

The NYC Human Rights Law incorporates by reference protections under Executive Law § 296(16). As a result, an amendment to Executive Law § 296(16), effective July 11, 2019, made it an unlawful discriminatory practice for employers to ask about or take adverse action against someone based on an adjournment in contemplation of dismissal (unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution).

Local Law 4 (2021), which takes effect July 29, 2021, adds new employment protections for workers with a record of criminal system involvement. Key changes include:

- New protections requiring a Fair Chance Analysis for job applicants with pending criminal cases. While employers may decide to fire or not hire someone because of a pending criminal charge or a criminal conviction, they must go through the Fair Chance Process before doing so.
- New protections requiring a Fair Chance Analysis for current employees facing discipline or termination related to an arrest or conviction that occurs during employment.
- Expanded protections prohibiting employers from asking about or taking adverse action based on unsealed violations.
- New protections requiring employers to provide job applicants notice and an opportunity to respond before rejecting them based on a perceived intentional misrepresentation of their criminal history.

These new protections, in addition to existing ones, now prohibit New York City employers from acting against all prospective and current employees simply because they have been arrested for or convicted of a crime, and these protections apply regardless of whether the arrest or conviction happened before or during employment.

2. Are there size limits that determine which employers are covered by the NYC Human Rights Law's protections for workers with a criminal history?

Some protections under the New York City Human Rights Law apply to employers of all sizes, unless an exception applies. Others apply only to employers with four or more employees (which includes the business owner and independent contractors).

Non-convictions

Unless an exception applies, employers of all sizes are prohibited from asking about non-pending arrests that did not lead to convictions; adjournments in contemplation of dismissal (unless revoked and the case is restored to the calendar for further prosecution); convictions that were sealed, expunged, or reversed on appeal; convictions for violations, infractions, or other petty offenses such as "disorderly conduct" (regardless of whether they are sealed); cases that resulted in a youthful offender outcome; and convictions that were withdrawn after completion of a court program.

Employers of all sizes should also bear in mind that additional protections under the Family Court Act prohibit them from asking about juvenile delinquency proceedings.

Pending cases and convictions for misdemeanors or felonies

Unless an exception applies, employers with four or more employees are required to: wait until after a conditional offer of employment before requesting and reviewing criminal records; conduct an individualized assessment of the Relevant Fair Chance Factors to determine whether adverse action may be taken based on an applicant's or employee's criminal history; before taking adverse action, provide the person with a copy of the individualized assessment and the criminal history information on which the employer relied for its assessment; and give time (generally five business days) for the person to respond to the analysis and criminal history information.

3. Are there any exceptions that apply to the NYC Human Rights Law's employment protections based on criminal history?

Yes. Please consult the *NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* for a detailed discussion of the exceptions.

4. Can an employer state that a "background check" is required for a position, or put "background check required" in a job advertisement or application?

No. Prior to a conditional offer of employment, an employer cannot state, including in a job ad or application, that a background check is required, unless an exception applies. The law defines prohibited inquiries and statements broadly, including those that express any limitation, directly or indirectly, based on a person's arrest or criminal conviction. Note that even some employers who are otherwise exempt to Section 8-107(11-a) because they are subject to federal, state, or local laws that require criminal background checks or prohibit the employment of people with certain criminal histories are prohibited from stating that a background check is required in a job advertisement or application.

Instead of using the term "background check," employers should be specific about what information they are seeking. An employer can state that it is conducting a "reference check," an "employment and education verification," or a "resume authentication," or may otherwise specifically indicate non-criminal information the employer is planning to investigate during the hiring process. The employer should not use the blanket term "background check," however, which is frequently understood to indicate a hiring limitation based on a person's criminal history.

5. How can an employer comply with the requirements of the Fair Credit Reporting Act ("FCRA") without violating the NYC Human Rights Law's protections related to criminal background checks?

Checks of all information other than criminal history must be completed before a conditional offer of employment is made. Employers seeking to use consumer reports as part of the hiring process must take several steps to ensure compliance with both the NYC Human Rights Law and FCRA.

- The employer generally must review all non-criminal hiring information prior to the conditional offer. Employers who request background checks on applicants should first receive the non-criminal information, evaluate it, and then separately receive and evaluate the criminal information. Employers may do this either by (1) working with a background check company to receive two separate reports, first one for non-criminal information, and after a conditional offer, another one for criminal information; or (2) establishing a system to separate the criminal history information from the non-criminal information contained in a single report and ensuring that the criminal information is available to hiring decisionmakers only after a conditional offer has been made. Employers who take the

second route bear the burden of proving that the criminal information was inaccessible to decisionmakers until after a conditional offer. The Commission recommends the approach of receiving two separate reports, first one for non-criminal information prior to a conditional offer and then a separate report on criminal history after a conditional offer has been made.

- Prior to a conditional offer, employers should omit any mention of criminal background check in the FCRA notice and should use the term “consumer report” rather than “background check”.
 - If, prior to a conditional offer, the employer will be performing an “investigative report,” within the meaning of FCRA (that is, a report based on personal interviews concerning a person’s character, general reputation, personal characteristics, and lifestyle), the NYCHRL does not prohibit the employer from complying with FCRA’s requirement that, *upon the written request of the subject of the report*, the employer must disclose the scope of the investigative report, including that the investigative report will include a review of criminal history information. See 15 U.S. Code § 1681d. However, the employer should not include mention of the criminal history in its initial FCRA notice and is prohibited from investigating or considering criminal background information prior to a conditional offer, absent an exception under the NYC Human Rights Law.
- In drafting their FCRA notices, employers should bear in mind that, unless an exception applies, the NYC Human Rights Law also prohibits them from considering credit history as part of the hiring process.

6. How should driving records be handled during the hiring process?

It generally is not practicable to segregate or separately access the criminal and non-criminal information in a person’s driving record. For this reason, driving records may only be reviewed after a conditional offer of employment has been extended, but an employer may decide to withdraw its conditional offer based on either criminal or non-criminal information in the record.

Although employers are generally prohibited from using non-criminal information after a conditional offer of employment, the Commission considers the non-criminal information in an applicant’s driving abstract to be “other information the employer could not have reasonably known before making the conditional offer,” and the employer is permitted to consider it after the conditional offer without violating the NYC Human Rights Law.

Information about criminal convictions and pending criminal cases for driving offenses must be reviewed consistent with the Fair Chance Process. This means employers must review the person’s conduct—whether it resulted in a conviction or is alleged in a pending case—in light of the Relevant Fair Chance Factors; provide the applicant with a written copy of its analysis and the information on which it relied if it wants to withdraw its offer; and give the applicant a reasonable period of at least five days to respond. Please consult the *NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* for a detailed discussion of the process.

7. After a conditional offer of employment, what can an employer ask an applicant about their arrest/conviction history?

After a conditional offer, an employer may ask an applicant about certain convictions and about pending cases (which do not include adjournments in contemplation of dismissal or “ACDs”). An

employer may also ask about the circumstances that led to any conviction or pending charge to determine how serious the applicant's conduct was and whether it relates to the responsibilities of the job or raises concerns for the safety or wellbeing of people or property. Note that employers have an affirmative obligation to inquire about the factors they are required to consider in the Fair Chance Analysis, including asking about their evidence of rehabilitation or good conduct.

Absent an exemption, an employer must never ask about arrests that did not lead to convictions; adjournments in contemplation of dismissal (unless they are revoked and the case is restored to the calendar for further prosecution); convictions that were sealed, expunged, or reversed on appeal; convictions for violations, infractions, or other petty offenses such as "disorderly conduct" (whether sealed or unsealed); cases that resulted in a youthful offender or juvenile delinquency finding in Family Court; or convictions that were withdrawn after completion of a court program. The following is an example of a permissible question after a conditional offer:

Have you ever been convicted of a misdemeanor or felony? Answer "NO" if you received an adjournment in contemplation of dismissal ("ACD") or if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as "disorderly conduct;" (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

8. Do the protections of the NYC Human Rights Law apply when a person has convictions from outside New York, particularly if the conviction is not a crime in New York?

Yes, the law applies to all criminal convictions, no matter where they occurred.

9. Do the protections of the NYC Human Rights Law apply to volunteers or unpaid interns at an organization?

The New York City Human Rights Law, does not apply to volunteers, but it does apply to unpaid interns. An intern is covered under the New York City Human Rights Law if: (a) the individual works for a fixed period of time at the end of which there is no expectation of employment; (b) the individual performing the work is not entitled to wages for the work performed; and (c) the work performed: (i) supplements training given in an educational environment that may enhance the employability of the intern; (ii) provides experience for the benefit of the individual performing the work; (iii) does not displace regular employees; and (iv) is performed under the close supervision of existing staff.

10. Does an employer's conditional offer have to be in writing?

No, the conditional offer may be made orally. However, there are other important steps in the employment process that must be made in writing. Specifically, if an employer is considering withdrawing a conditional offer after reviewing an applicant's conviction history, it must provide its Fair Chance Analysis in writing, which may be accomplished by using the Commission's Fair Chance Notice. If, after an applicant responds to an employer's Fair Chance Analysis, the employer still wants to withdraw its conditional offer, the employer's decision must also be in writing. Please consult the *NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* for a detailed discussion of the process.

11. If a position is exempt from the Fair Chance Process under Section 8-107(11-a)(g) of the NYC Human Rights Law, does the employer still have to review a job applicant's criminal history in light of the Relevant Fair Chance Factors under Section 8-107(10)?

In many cases, yes. Under Section 8-107(11-a)(g) of the NYC Human Rights Law, employers need not wait until after a conditional offer to discuss a job applicant's criminal history or to conduct a criminal background check when the position is for a police officer or peace officer; at a law enforcement agency (as defined in Article 23-A of the New York Correction Law); listed as exempt on the NYC Department of Citywide Administrative Services website; or subject to a law requiring a criminal background check or barring employment based on a particular criminal history.

These employers, however, may not be exempt from Section 8-107(10) of the NYC Human Rights Law, which prohibits adverse employment actions based on criminal convictions and pending charges. For a full discussion of these exemptions, please consult the *NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* for a detailed discussion of exemptions.

Employers should also note that an applicant who is denied employment based on a Fair Chance Analysis of their pre-employment conviction history are entitled under New York Correction Law § 754 to request an explanation, which the employer must provide within 30 days.

12. Can a job posting say that an “employer will consider qualified applicants with criminal histories, consistent with the law”?

Generally, no. Saying that qualified applicants with criminal histories will be considered “consistent with the law” (or using similar neutral language about criminal history), communicates that criminal histories will be considered during the hiring process and could discourage qualified applicants from applying for a job, in violation of the NYC Human Rights Law. If you are conducting recruitment in NYC and another jurisdiction with different advertising requirements related to criminal background checks in employment, you should contact the Commission's policy office at policy@cchr.nyc.gov.

13. Are there other laws that provide employment protections based on criminal history in New York?

Yes. Other protections for workers with criminal system involvement arise under New York Family Court Act § 380.1, Executive Law § 296, and Correction Law Article 23-A. You should consult an attorney if you have questions about how these laws may apply to your situation.

14. May an employer discipline or terminate an employee who is unable to report to work because they are in custody?

Yes. The NYC Human Rights Law does not prohibit an employer from maintaining its standard attendance policies. However, the Commission's Law Enforcement Bureau will consider whether an attendance policy has been used as a pretextual basis for discriminating against an employee based on their criminal history if, for example, the employer typically does not discipline or terminate employees who miss work for other reasons.

If the employer is acting based on an employee's actual absence from work, as opposed to the fact that they were arrested, it may discipline the employee consistent with its regular absentee

policy without performing a Fair Chance Analysis of the employee's pending case. However, if the employer is concerned about the person's ability to perform the duties of their job because of future absences resulting from their arrest, it is required to conduct a Fair Chance Analysis of the pending case.